

Claimant appeared by his attorney, Orvel Mason of Arkansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Robert G. Martin of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, E. Thomas Pyle, III of Hutchinson, Kansas.

RECORD AND STIPULATIONS

The Appeals Board reviewed the record and adopted the stipulations listed in the Award.

ISSUES

- (1) Nature and extent of claimant's disability.
- (2) Liability of the Kansas Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs and arguments of the parties, the Appeals Board finds that the Award of the Special Administrative Law Judge should be modified to find claimant is entitled to permanent partial disability compensation based upon his functional impairment rating of 11 percent to the body as a whole. The Award should otherwise be affirmed.

Claimant alleged personal injury by accident over a period of time which included three specific dates of accident. For purposes of this Award the parties agreed to a single accident date of December 12, 1991. As a result of his injuries, claimant ultimately underwent surgery which included a spinal fusion on March 2, 1992. Claimant returned to work with respondent performing the same job he performed prior to his injury. At the time of regular hearing claimant was earning a higher wage than that which he was earning at the time of his injury. Although respondent encouraged claimant to work at his own pace, claimant's job duties were essentially the same as those which he had performed prior to his accident. Claimant attempted to perform his job duties in a manner which would protect his back. As much as possible he would limit heavy lifting and working in awkward positions. It was claimant's testimony that the job exceeded the restrictions of both the treating and the examining physicians. Nevertheless, claimant continued to perform that job, albeit with some pain and difficulty, for several years and was still performing the job at the time this case was submitted for award.

K.S.A. 1991 Supp. 44-510e(a) sets out the statutory definition of permanent partial general disability and the factors to be considered when computing the percentage of disability. The statute also states a presumption that a claimant whose postinjury wage is comparable to his preinjury wage does not have a work disability. It is uncontroverted that claimant's postinjury wage exceeds his preinjury wage. However, claimant argues the testimony of the vocational experts overcomes the presumption. Both James Molski, on behalf of claimant, and Karen Terrill, on behalf of respondent, testified that claimant's access to the labor market was restricted. Their opinions varied in part based upon which

physician's restrictions were applied. Mr. Molski also opined that claimant had suffered a loss of wage-earning ability. Nevertheless, the Appeals Board does not find the evidence presented overcomes the presumption against a work disability. Claimant returned to work following his surgery and continued to work for respondent in the same or similar positions and at a higher wage for a period of years. Although claimant experienced episodes of discomfort from the work, he nonetheless demonstrated an ability to perform activities well beyond the restrictions imposed by Dr. Ernest R. Schlachter. We find those restrictions to be excessive. The deposition of the treating physician, Dr. Charles D. Pence, was not taken. His precise restrictions are, therefore, not in evidence. Nevertheless, it appears that his orthopedic recommendations were not nearly as limiting as were those given by Dr. Schlachter. In addition, the deposition of another orthopedic surgeon, Dr. Duane A. Murphy, was taken. He offered an opinion as to what would be appropriate restrictions for claimant. His opinion appears to fall somewhere between those of Dr. Schlachter and Dr. Pence. Based upon the record taken as a whole, the Appeals Board does not find the evidence sufficient to overcome the presumption set out in K.S.A. 1991 Supp. 44-510e(a). Therefore, claimant is entitled to an award for permanent partial disability based upon his functional impairment.

With regard to the issue of Fund liability, the Appeals Board finds respondent did not meet its burden of proving it had knowledge of claimant's alleged handicap prior to his work-related accident. Although there is evidence that at least one of claimant's supervisors knew that claimant had prior back problems, such knowledge did not rise to the level of establishing that respondent knowingly employed or retained a handicapped employee as defined in K.S.A. 44-566(d). Respondent was not aware that claimant was under permanent restrictions prior to the accident which is the subject of this claim and claimant's job duties were never permanently changed to accommodate his back condition prior to December 12, 1991. There is no evidence that respondent filed a Form 88 with the Division prior to the subject accident nor does the evidence otherwise suggest that claimant was considered to be a handicapped worker. Accordingly, the Award by the Special Administrative Law Judge denying liability against the Fund should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Michael T. Harris dated September 20, 1996, should be, and is hereby, modified to award an 11% permanent partial general body disability.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jack R. McChristian, and against the respondent, Total Petroleum, Inc., and its insurance carrier, Hartford Accident & Indemnity, for an accidental injury which occurred December 12, 1991, and based upon an average weekly wage of \$649.82 for 39.29 weeks of temporary total

disability compensation at the rate of \$289.00 per week or \$11,354.81, followed by 375.71 weeks of permanent partial compensation in the sum of \$47.66, per week or \$17,906.34 for a 11% permanent partial general body disability, making a total award of \$29,261.15.

As of December 20, 1996, there is due and owing claimant 39.29 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$11,354.81, followed by 222.85 weeks of permanent partial compensation at the rate of \$47.66 per week in the sum of \$10,621.03 for a total of \$21,975.84, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$7,285.31 is to be paid for 152.86 weeks at the rate of \$47.66 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Orvel Mason, Arkansas City, KS
Robert G. Martin, Wichita, KS
E. Thomas Pyle, III, Hutchinson, KS
Michael T. Harris, Special Administrative Law Judge
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director